Supreme Court, U.S.
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No. ____

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# In the Supreme Court of the United States

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UNITED STATES OF AMERICA,
*Petitioner,*

*v.*

TONY M. LISTER,
*Respondent.*

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

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## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether federal sentencing practices violate the Sixth Amendment when sentences that vary from the advisory Sentencing Guidelines receive substantially less appellate deference than sentences imposed within the recommended guideline range?

2. Whether a defendant's Fifth Amendment right to due process of law is violated when a sentence significantly punishes uncharged conduct that is alleged in a presentence report but not proved beyond a reasonable doubt in a proceeding that gives the defendant an opportunity to confront his accuser?

3. Whether a defendant's Fifth Amendment right to due process of law is violated when a court denies a Sentencing Guidelines adjustment for acceptance of responsibility on the basis of his counsel's legal objections to the presentence report?

## PARTIES TO THE PROCEEDING

All parties to the proceeding are listed in the caption. The petitioner is not a corporation.

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## PETITION FOR WRIT OF CERTIORARI

Petitioner Tony Lister respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

## OPINION BELOW

The opinion of the court of appeals (App. 1a to 15a) is reported at 432 F.3d 754 (7th Cir. 2005). The district court did not render a written opinion.

## JURISDICTION

The judgment of the court of appeals was entered on December 28, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS

The relevant constitutional, statutory, and international law provisions involved are set forth in Appendix 16a-18a, infra.

## STATEMENT OF THE CASE

An indictment was filed on May 24, 2004 charging Tony Lister, Carlos Hodges, and Mandrick Brown with distributing more than five grams of a mixture or substance containing cocaine base. Dkt. 1. A superseding indictment filed on August 4, 2004 preserved the initial count while additionally charging Lister with conspiring to distribute more than fifty grams of cocaine base. Dkt. 30. The district court had jurisdiction over this criminal prosecution pursuant to 18 U.S.C. §3231.

Lister entered a guilty plea to count 1 on October 15, 2004. Dkt. 74. During the plea hearing, the government proffered that Lister played a role in a sale of one and one half ounces of cocaine base on December 6, 2001. Lister acknowledged that Torrence Sims called him and asked if he knew anyone who could supply cocaine base. Lister called Hodges and told him what Sims wanted. When Sims called back, Lister told him that Hodges wanted $1100. Lister's role was that of a middleman, connecting Hodges to Sims. Dkt. 83: 20-21.

Although the crime of conviction involved 42.5 grams of cocaine base, the presentence report recommended that Lister be held accountable for 1.84 kilograms of cocaine base. PSR ¶ 35. Lister's counsel objected to the report.

Although Lister did not personally adopt the objections, the sentencing court concluded that Lister did not accept responsibility for his relevant conduct.

Lister was sentenced on December 16, 2004 to 405 months in prison. Dkt. 78. Judgment was entered on December 20, 2004. Dkt. 79. Lister appealed. The Court of Appeals for the Seventh Circuit affirmed the judgment on December 28, 2005.

## REASONS FOR GRANTING THE WRIT

### I. FEDERAL SENTENCING PRACTICES VIOLATE THE SIXTH AMENDMENT WHEN SENTENCES THAT VARY FROM THE ADVISORY GUIDELINES RECEIVE SUBSTANTIALLY LESS APPELLATE DEFERENCE THAN SENTENCES IMPOSED WITHIN THE RECOMMENDED GUIDELINE RANGE

1. Lower courts disagree about the amount of discretion sentencing judges possess to impose a shorter or longer sentence than the U.S. Sentencing Guidelines recommend. Some courts, including the Seventh Circuit, fetter a judge's discretion to a degree that again gives the Guidelines binding force. In circuits that treat the sentencing guidelines as *de facto* binding, sentencing practices violate the right to jury trial. See *United States v. Booker*, 543 U.S. 220 (2005).

Lister was sentenced within the range recommended by the advisory Sentencing Guidelines. In that respect, he is like most other defendants, both before and after *Booker*. The *Booker* decision had little impact on sentencing practices. *See* U.S. Sentencing Comm'n, Final Report on the Impact of United States v. Booker on Federal Sentencing vi-vii (available at http://www.ussc.gov/booker_report/Booker_Report.pdf) (85 percent of sentences continue to fall within the guidelines, as they did before *Booker*, and sentences have stayed about the same, or are slightly longer, after *Booker*). Despite judicial dissatisfaction with the guidelines prior to *Booker*, see *Booker*, 543 U.S. at 305 (Scalia, J., dissenting) (citing "the notorious unpopularity of the Guidelines with many district judges"), sentencing judges after *Booker* have shown little willingness to find that mitigating factors outweigh the advisory guidelines. This must be due, at least in part, to appellate decisions that limit their ability to make those judgments.

The Seventh Circuit has declared that sentencing within the applicable guideline range will be reviewed as a presumptively correct exercise of sentencing discretion. *United States v. Mykytiuk*, 415 F.3d 606, 608 (7th Cir. 2005). Sentences within that range receive little appellate scrutiny for reasonableness. *See United States v.*

*Williams,* 436 F.3d 767, 768 (7th Cir. 2006) ("a sentence within the guidelines range will rarely be unreasonable"). Sentences outside the guideline range do not receive the same deference. *Id.*

The Fourth Circuit had adopted a similar standard, while further clarifying the amount of deference owed to a sentence that varies significantly from the Guideline-recommended sentence: almost none. "In order to withstand reasonableness scrutiny, such a dramatic variance from the advisory guideline range must be supported by compelling justifications related to § 3553(a) factors, and 'excessive weight' may not be given to any single factor." *US v. Hampton*, 2006 WL 724811, *3 (4th Cir. Mar. 23, 2006). Decisions like these give excessive weight to the Guidelines: that is, greater weight than a judge might think they warrant under the circumstances of the case.

By creating a presumption that guideline-conforming sentences are correct and by granting less deference to sentences outside the guideline range, these decisions have rendered the guidelines legally enforceable. As a practical matter, the guidelines are as binding as they were prior to the excision of § 3553(b). The Guidelines permitted departures under some circumstances, *see Koon v. United States,* 518 U.S. 81 (1996), but the grant of limited departure authority did not alter their status as

binding legal rules. That is why the application of the Guidelines to Booker violated his right to jury trial. *Booker*, 543 U.S. at 234 (availability of departure to account for unusual aggravating or mitigating circumstances did not avoid the constitutional violation).

Imposing limits on discretion that assure the Guidelines will be followed in most circumstances restores the constitutional infirmity that the Court corrected in *Booker*. The Court recognized that closely-cabined discretion is not enough when it rejected the argument that the guidelines' grant of limited discretionary authority to depart saved them from a Sixth Amendment challenge. As did the Guidelines before *Booker*, the Seventh Circuit has created a scheme that ties sentencing to the guidelines and authorizes judges to stray from a Guideline sentence only under limited circum-stances.

The presumptive sentencing guidelines that exist in the Seventh Circuit are difficult to distinguish in principle from the presumptive guidelines that were invalidated in *Blakely v. Washington*, 542 U.S. 296 (2004). The Washington scheme created presumptive sentencing ranges while authorizing a court to sentence outside of the range for substantial reasons. 542 U.S. at 299-30; *id.* at 325 (O'Connor, J., dissenting). If anything, by reviewing sentences outside the guideline

range for clear error, *id.* at 300, Washington's appellate courts may have been more deferential than the Seventh Circuit in their review of sentences that fall outside the presumptive range.

Judicial decisions that give the guidelines the force of binding legal rules run afoul of the Sixth Amendment. Whether the guidelines are made binding by Congress or by appellate courts does not matter. Just as "the fact that the Guidelines were promulgated by the Sentencing Commission, rather than Congress, lacks constitutional significance," *Booker*, 543 U.S. at 237, the constitutional violation is not lessened if the judicial branch, rather than the legislative or executive, makes the sentencing rules binding.

2. The Booker decision envisioned a sentence regime that would follow 18 U.S.C. § 3553(a). *Booker*, 543 U.S. at 261. That statute directs the court to consider several factors in crafting a sentence that is "not greater than necessary" to achieve the goals of federal sentencing. The Guidelines are an important factor, *id.* at 264, but they are not the only factor. Nothing in the *Booker* decision elevates the status of the guidelines over other factors that sentencing judges must consider. Nothing in *Booker* suggests that a Guideline-compliant sentence is a presumptively correct sentence, or that sentences falling outside the Guidelines

require greater justification than guideline-conforming sentences. *See id.* at 305-06 (Scalia, J., dissenting) ("If the majority thought otherwise—if it thought the Guidelines not only had to be 'considered' (as the amputated statute requires) but had generally to be followed—its opinion would surely say so").

The remedial majority in *Booker* did not suggest that a sentence falling outside the guideline range should be reviewed for reasonableness by a less deferential standard than that applied to sentences within a guideline range. It appears that the Court took care to avoid recreating the constitutional error that it addressed by making the guidelines truly advisory and nonbinding. *Id.* at 312 (Scalia, J., dissenting) ("Bear in mind that one of the most significant features of the remedial majority's scheme of 'unreasonableness' review is that it requires courts of appeals to evaluate each sentence *individually* for reasonableness, rather than apply the cookie-cutter standards of the mandatory Guidelines (within the correct Guidelines range, affirm; outside the range without adequate explanation, vacate and remand)").

By limiting a sentencing court's discretion to sentence outside the guidelines, and by imposing a more deferential standard of review on sentences that fall within a guideline

range, the Seventh Circuit has restored the mandatory nature of Guideline sentencing. The Supreme Court should grant certiorari in this case to correct a misapplication of *Booker* that undermines the *Booker* remedy and that threatens the Sixth Amendment rights that *Booker* vindicated.

3. The Court should also grant certiorari to resolve uncertainty regarding the correct standard by which to review sentences for reasonableness. Several courts, like the Seventh Circuit, have declared sentences within a correctly calculated guideline range to be presumptively reasonable. *See United States v. Green*, 436 F.3d 449 (4th Cir. 2006); *United States v. Smith*, 2006 U.S. App. LEXIS 3994, *6 (5th Cir. Feb. 17, 2006); *United States v. Williams*, 436 F.3d 706, 708 (6th Cir. 2006); *United States v. Lincoln*, 413 F.3d 716, 717 (8th Cir. 2005); *United States v. Kristl*, 437 F.3d 1050 (10th Cir. 2006). On the other hand, the Court of Appeals for the Third Circuit, wary of coming "close to restoring the mandatory nature of the guidelines excised in *Booker*," did not "find it necessary, as did the Court of Appeals for the Seventh Circuit in *United States v. Mykytiuk*, to adopt a rebuttable presumption of reasonableness for within-guidelines sentences." *United States v. Cooper*, 437 F.3d 324, 331-32 (3d Cir. 2006). In the Second Circuit, judges need

not even determine the precisely applicable Guideline if they can settle upon a sentence that is generally guided by the Guidelines in concert with the other factors identified in § 3553(a). *United States v. Crosby*, 397 F.3d 103, 112 (2d Cir. 2005). That approach is the most consistent with *Booker*.

If uniformity is a serious goal of federal sentencing, *Booker*, 543 U.S. at 246, judges in each district must impose sentences under the same rules. The judge's ability to greater or lesser weight to the factors in § 3553(a), including the Guidelines, should not depend upon the circuit in which the defendant is sentenced.

This non-uniform approach to appellate review of federal sentences will continue until the Court determines whether the Sentencing Guidelines are, in nearly every case, entitled to greater weight than the other factors in § 3553(a), whether sentences within the applicable Guideline range carry a presumption of reasonableness, and whether the review of a sentence outside of the applicable Guideline range should be less deferential. The only answer true to *Booker* is one that vests the full discretion that judges customarily have to make reasonable decisions. *Booker*, 543 U.S. at 305 (Scalia, J., dissenting) ("logic compels the conclusion that the sentencing judge, after considering the recited factors (including

the Guidelines), has full discretion, as full as what he possessed before the Act was passed, to sentence anywhere within the statutory range"). This Court should grant certiorari in this case to assure that all defendants are entitled to the full range of sentencing discretion granted by § 3553(a) and contemplated by the *Booker* decision.

## II. THE DEFENDANT'S RIGHT TO DUE PROCESS OF LAW IS VIOLATED WHEN A SENTENCE SIGNIFICANTLY PUNISHES UNCHARGED CONDUCT THAT IS NOT PROVED BEYOND A REASONABLE DOUBT

1. Lister saw his sentence balloon from no more than 87 months (the Guideline maximum based on the crime he admitted at his plea hearing) to a term of 405 months based on crimes that were alleged in the presentence report. Lister did not admit those crimes. The government called no witnesses to prove those crimes. None of the fundamental protections that assure the reliability of facts upon which punishment is based, including a heightened standard of proof and confrontation of the accuser, attended the sentencing judge's finding of those facts.

The Framers would have been appalled by a sentencing system that punishes individuals for crimes that have not been admitted or proved beyond a reasonable doubt at an adversarial

process where accusers can be confronted. The Court condemned this system in *Blakely*, 542 U.S. at 311-12:

> Any evaluation of *Apprendi's* "fairness" to criminal defendants must compare it with the regime it replaced, in which a defendant, with no warning in either his indictment or plea, would routinely see his maximum potential sentence balloon from as little as five years to as much as life imprisonment, see 21 U.S.C. §§ 841(b)(1)(A), (D), based not on facts proved to his peers beyond a reasonable doubt, but on facts extracted after trial from a report compiled by a probation officer who the judge thinks more likely got it right than got it wrong.

If the Sixth Amendment does not prohibit this practice, the Fifth Amendment must. "As a matter of simple justice, it seems obvious that the procedural safeguards designed to protect [Lister] from unwarranted pains should apply equally to ... acts that [the government] has singled out for punishment." *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000).

The Court's decisions in *Apprendi*, *Blakely*, and *Booker* focused attention on systemic flaws in federal sentencing that

extend beyond the concerns protected by Sixth Amendment's right to jury trial. The Court should accept this case to decide how best to protect the fundamental right to fair punishment procedures in the aftermath of *Booker*.

2. In *McMillan v. Pennsylvania*, 477 U.S. 79, 85-86 (1986), the Supreme Court drew a distinction between offense elements, which must be proved to a jury, and sentencing facts, which need not be. That distinction was significantly eroded in *Apprendi*, 530 U.S. at 476, when the Court acknowledged its inability to discern a "principled basis" for treating proof of the two kinds of facts differently. 530 U.S. at 476. It was further eroded in subsequent decisions. *See Ring v. Arizona*, 536 U.S. 584, 602 (2002) (rejecting importance of label attached to fact); *Blakely*, 542 U.S. at 306 (rejecting label as factor that decides whether a fact must be proved to a jury).

The now-discredited distinction that *McMillan* drew between elements and sentencing facts saved a statute that permitted a judge to find the facts that triggered a mandatory minimum sentence. *McMillan*, 477 U.S. at 87-88. The Court was careful to note, however, that the statute under consideration did not "permit the ... finding to be a tail which wags the dog of the substantive offense." *Id.* at 88.

Lister's is a glaring example of a "tail wag dog" sentence. Lister's crime of conviction involved 42.5 grams of cocaine base. His sentence punished him for involvement with 1.84 kilograms—an amount four hundred times greater than the amount he admitted at his plea hearing.

The Court disparaged the "tail which wags the dog" analogy in *Blakely,* 542 U.S. at 307-08, because the test is subjective and insufficiently precise to serve as a meaningful standard for invoking the right to jury trial. Imprecise as it is, the "tail wags dog" analogy provides a rough measure of due process. *See Blakely,* 542 U.S. at 344 (Breyer, J., dissenting) ("Congress might permit a judge to sentence an individual for murder though convicted only of making an illegal lane change ... [b]ut that is the kind of problem that the Due Process Clause is well suited to cure"). When, as in Lister's case, a significant part of the punishment is imposed to punish conduct that the defendant did not admit and that the jury did not determine, due process demands procedural protections designed to assure that the sentence is based on highly reliable evidence.

Due process requires that sentences be based on reliable information. *See United States v. Tucker,* 404 U.S. 443, 447 (1972). When a sentence is specifically enhanced to punish specific criminal

behavior, there is no principled reason to accept evidence any less reliable than that required to establish guilt. When a loss of freedom depends upon proof of specific misconduct, the right to test the government's evidence by cross-examination of live witnesses is integral to a fact-finding proceeding that reliably determines a defendant's culpability. Hearsay in a presentence report should not be enough, even if the judge thinks the probation officer "more likely got it right than got it wrong." *Blakely*, 542 U.S. at 312.

Both *Blakely*'s majority opinion, with its indictment of fact-finding on the basis of hearsay statements regurgitated in police reports, *id.* at 311-12, and Justice Breyer's dissenting opinion, with its recognition that the focus of sentencing should be on the dog of the substantive offense and not on the tail, 542 U.S. at 344 (Breyer, J., dissenting), provide cause to vacate Lister's sentence. His sentence grew by more than a quarter century on the basis of asserted crimes for which he was not tried and about which no witness testified. Hearsay in a presentence report, accepted at face value as more likely true than not, was the tail that wagged Lister's sentence.

Because there is no principled way to draw a line between the tail and the dog, most of the procedural protections of a criminal trial should govern proof of

facts under a scheme that ties additional punishment to facts that demonstrate additional criminal culpability. When the government "sets out to prove actual conduct ... in a sentencing proceeding at which the defendant is represented by counsel, counsel can put the State to its proof, examining its witnesses, rebutting its evidence, and testing the reliability of its allegations." *Nichols v. United States*, 511 U.S. 738, 759-60 (1994) (Blackmun, J., dissenting). But counsel can only perform those tasks if the government calls witnesses whose knowledge and credibility can be challenged through cross-examination. Requiring the government to prove its sentencing allegations, rather than requiring the defendant to disprove allegations that will otherwise be accepted as fact, is fundamental to a fair sentencing process.

3. When, as here, the court's finding of certain facts will result in extra punishment, those facts must be as reliable as facts that prove guilt. A guideline-compliant sentence that punished the conduct admitted at Lister's plea hearing, standing alone, would not have exceeded 87 months. There is no principled basis for making the government prove beyond a reasonable doubt the conduct that took 87 months of Lister's life, while allowing the remaining 318 months of punishment to be found more likely true than not.

Proof beyond a reasonable doubt provides the degree of reliability necessary to criminal punishment. It is "a prime instrument for reducing the risk of convictions resting on factual error." *In re Winship*, 397 U.S. 358, 363 (1970). The *Winship* Court agreed that it would be fundamentally unfair for a defendant to be "imprisoned for years on the strength of the same evidence as would suffice in a civil case." *Id.* Yet 26 years were added to Lister's sentence to punish him for crimes that were subject to proof by only a preponderance of the evidence. The Supreme Court should accept review to decide whether judges may expressly impose additional punishment for additional crimes without requiring that those crimes be proved beyond a reasonable doubt at a proceeding that protects the defendant's right to confront his accusers.

## III. A DEFENDANT'S RIGHT TO DUE PROCESS OF LAW IS VIOLATED WHEN A COURT DENIES AN ADJUSTMENT FOR ACCEPTANCE OF RESPONSIBILITY ON THE BASIS OF HIS COUNSEL'S LEGAL OBJECTIONS TO THE PRESENTENCE REPORT

The final slap in Lister's face came when his counsel made a legal challenge to the adequacy of the government's proof

of the uncharged conduct that added more than two decades to his sentence. Disregarding circuit precedent, the district court viewed the objections as Lister's personal assertion of innocence, even though Lister did not accept the court's invitation to adopt the objections as his own.

Entering a guilty plea before trial starts and admitting the conduct that comprises the offense of conviction is significant evidence that the defendant has accepted responsibility. Guidelines § 3E1.1, comment. (n.1(a)), (n. 3). Lister entered his guilty plea before trial. During the plea hearing, Lister admitted all the offense conduct that the government proffered it could prove. Dkt. 83: 16-20. He also answered all of the district court's questions about the offense of conviction, admitting the role he played in the drug transaction, his knowledge of the transaction, and the amount of cocaine involved. Dkt. 83: 20-23.

The government acknowledged the timeliness of Lister's guilty plea and recommended to the court that Lister receive the full three point reduction in his offense level for his acceptance of responsibility. Dkt. 83: 11. The presentence report also recommended a three point reduction for acceptance of responsibility. PSR ¶ 47.

Acceptance of responsibility requires only an admission of the facts underlying

the offense of conviction. It does not require the defendant to admit relevant conduct beyond the offense of conviction. Guidelines § 3E1.1, comment. (n.1(a)). "A defendant may remain silent in respect to relevant conduct beyond the offense of conviction without affecting his ability to obtain a reduction under this subsection." *Id.* On the other hand, a defendant does not accept responsibility if he falsely denies or frivolously contests relevant conduct. Guidelines § 3E1.1, comment. (n.1(a)).

Lister exercised his right not to comment upon relevant conduct during his presentence interview. He did the same at sentencing. Dkt. 84: 3. Lister said nothing to the court that constituted a denial of relevant conduct.

The district court concluded that objections to the presentence report filed by Lister's defense counsel were frivolous and viewed the objections as inconsistent with acceptance of responsibility. The objections questioned whether a statement upon which the court relied pertained to relevant conduct or to earlier crimes. The government advised the district court that "the defendant didn't object to what he said in the statement. He objected to what it related to and how far back in time that related. So he didn't object to those facts themselves." Dkt. 84: 18. The district court nonetheless construed the

objections as factual denials of relevant conduct.

Before Lister's case was decided, the Court of Appeals for the Seventh Circuit did not permit counsel's objections to reflect on a defendant's acceptance of responsibility unless the defendant adopted the objections. The court of appeals did not view counsel's objections as bearing on the defendant's "moral acceptance of responsibility" unless there was "some reason to attribute the attorney's statements to the otherwise silent defendant." *United States v. Purchess*, 107 F.3d 1261, 1268 (7th Cir. 1997). Consequently, counsel's objections to the presentence report, without more, were not a basis for presuming that the defendant hasn't accepted responsibility. *Id.* Unless the defendant actually presents evidence in support of a frivolous challenge to the presentence report, or the defendant acknowledged his understanding of and adopted counsel's objections, those objections could not be a basis for denying credit for acceptance of responsibility. *Id.* at 1268-69.

When the district court asked Lister "are you in agreement with those challenges which have been made on your behalf?," Lister responded "Basically I rely on my lawyer for that, Your Honor." The court asked "Then you don't agree with him, is that what you're saying?" and Lister answered "Yeah. I basically just

rely on him for it." (Dkt. 84: 2-3) In reliance on *Purchess*, Lister did not adopt his counsel's challenges, choosing instead to remain silent with regard to relevant conduct.

The court of appeals held that *Purchess* offered Lister no protection, because "it is not the responsibility of the court to interrogate the defendant and elicit a response where he effectively avoids answering the question." *Lister*, 432 F.3d at 760. Yet, as the Guidelines recognize, Lister had every right to avoid answering any question that concerned uncharged conduct. And while the Court of Appeals thought Lister was engaging in "legal hair-splitting," *id.*, Lister repeatedly told the court that he left the lawyering to his lawyer. With no indication that Lister actually adopted (or even understood) his counsel's objections, the Court of Appeals' refusal to allow Lister to follow the *Purchess* decision was fundamentally unfair.

MARCH 2006

T. CHRISTOPHER KELLY
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## APPENDIX


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# In the
# United States Court of Appeals
## For the Seventh Circuit

No. 04-4304

UNITED STATES OF AMERICA,

*Plaintiff-Appellee,*

*v.*

TONY M. LISTER,

*Defendant-Appellant.*

Appeal from the United States District Court
for the Western District of Wisconsin.
No. 04 CR 074—**John C. Shabaz**, *Judge.*

ARGUED SEPTEMBER 9, 2005—DECIDED DECEMBER 28, 2005

Before BAUER, POSNER, and WOOD, *Circuit Judges.*

BAUER, *Circuit Judge.* Tony M. Lister pleaded guilty to one count of distribution of a controlled substance, 21 U.S.C. § 841(a)(1), after arranging for the sale of more than five grams of cocaine base to a government agent. In his pre-sentencing interview, Lister admitted to trafficking at least 1.8 kilograms of cocaine base over the course of the four years prior to his arrest. At the sentencing hearing, Lister's attorney challenged certain facts within the presentence investigation report, but Lister raised no personal objections, even under judicial questioning. The district court found the presentence investigation report to be reliable by a preponderance of the evidence and sentenced him to 405 months of

incarceration. On appeal, petitioner claims error for the district court's refusal to grant credit for his acceptance of responsibility, the length of his sentence, and the district court's findings on relevant conduct. We affirm.

## I. Background

On December 6, 2001, Torrence Sims telephoned Lister and asked him to supply one and one-half ounces of cocaine base for $1100. Sims was acting on behalf of the government. Lister took up the request and arranged the transaction through Carlos Hodges, who procured and delivered the cocaine base for the requested cost. The entire transaction, including the telephone calls and the delivery of about 36 grams of a mixture containing cocaine base, was monitored by a law enforcement agent.

On May 24, 2004, a grand jury returned an indictment charging Lister with distributing more than five grams of cocaine base, 21 U.S.C. § 841(a)(1). A superseding indictment was filed on August 4, 2004, restating this count among others. Lister ultimately struck an agreement with the government and pleaded guilty to the original charge on October 15, 2004, before Judge Shabaz.

At the plea hearing, Judge Shabaz informed Lister that the plea agreement was merely a recommendation that the court could reject "without permitting you to withdraw your plea of guilty and could then impose a sentence that is more severe than you may be expecting." Plea Hr'g Tr. 5-7, Oct. 15, 2004. He noted that should the court reject the plea agreement, Lister would be provided with the opportunity to change his plea to not guilty. *Id.* at 7. Lister firmly acknowledged these possibilities. Additionally, Judge Shabaz addressed the holding in *United States v. Booker*, 375 F.3d 508 (7th Cir. July 9, 2004), and its effect on the Federal Sentencing

Guidelines, noting that, at that time, the case had been argued before the Supreme Court but that a final opinion had not yet been issued. Most importantly, Judge Shabaz explicitly stated that Lister's plea carried "penalties of a minimum mandatory term of five years and a maximum of 40 years in prison, a $2 million fine, a four-year period of supervised release and $100 special assessment." Plea Hr'g Tr. 9, Oct. 15, 2004. When asked if he understood this possible penalty, Lister stated simply "yes." *Id.*

Following the plea hearing, the U.S. Probation Office prepared a presentence investigation report (PSIR) for use at sentencing. When interviewed for the report in 2004, Lister recounted his criminal and personal past in a series of non-immunized statements. He admitted that approximately five years earlier he began producing cocaine base with the assistance of Torrence Sims. Lister purchased an ounce of powder cocaine on a weekly basis and Sims converted it to cocaine base. The result of this operation was that Lister distributed one and one-quarter ounces of cocaine base on a weekly basis for approximately one year. Using these statistics, the Probation Office calculated Lister's admitted cocaine distribution and concluded that Lister was responsible for distributing a minimum of 1.84 kilograms of cocaine base over the prior three years (1.25 ounces converts to 35.44 grams, and this amount multiplied by 52 (weeks) yields 1.84 kilograms).

Two other individuals interviewed for the PSIR, Derrick Gosha and Torrence Sims, attributed far greater amounts of cocaine base to Lister. Gosha was interviewed by Wisconsin state and municipal investigators on October 15 and 23, 2001, and later testified before a federal grand jury on June 4, 2003. He estimated purchasing nine to 14 ounces of cocaine base from Lister somewhere between 20 to 30 times from 1999 to July 2001. He also recounted making two larger transactions with Lister. In

total, Gosha attributed 5.62 kilograms of cocaine base to Lister. Sims was interviewed by municipal investigators on November 8 and 27, 2001, and testified before a federal grand jury on July 16, 2003. He testified that he had been purchasing cocaine and cocaine base from Lister from about 2000 or 2001. His total attribution to Lister was 4.12 kilograms of cocaine base and an equal amount of cocaine.

The Probation Office also recounted Lister's personal and criminal history, which included four years of attendance at Beloit Memorial High School and a year of studies at Blackhawk Technical College in Janesville, Wisconsin. Lister also admitted to having a substance abuse problem, which began in his early teenage years and progressively worsened until his arrest in the instant matter. Regarding his criminal history, Lister's most notable offense was his 1998 conviction of possession of cocaine with intent to distribute.

Based upon Lister's admissions, his personal and criminal history, and the corroborating testimony, the Probation Office recommended that Lister be sentenced at an offense level of 35, assuming a three point reduction for his accepting responsibility for the crime. U.S.S.G. § 3E1.1. This point total was calculated using the 1.84 kilogram admission made by Lister. U.S.S.G. §§ 2D1.1, 1B1.3(a)(1)(A) and (B).

Lister's attorney, however, contested the chronology of the PSIR. He argued that the distribution of the additional quantity of cocaine base had actually taken place before 1998. Were this the case, the additional distributions would have occurred before his previous conviction for possession with intent to distribute and the district court would have been in error to punish him twice.

Relying primarily upon Lister's own admissions in his interview, the district court found that the chronology

presented in the PSIR was reliable by a preponderance of the evidence. When finding that the relevant conduct had taken place after the 1998 conviction, Judge Shabaz noted that Lister had waived his constitutional rights during the interview and that "the most reliable information is that which is attributed to the defendant in that statement." Sentencing Hr'g Tr. 13, Dec. 16, 2004. He reiterated that "[t]he Court has relied primarily on the defendant's statement to investigators in making the determination of reliable conduct which it considers in sentencing and [uses] the other witnesses to corroborate the facts that defendant was involved in drug dealing activities from at least January 2000 to January 7, 2002." *Id.* at 14. This finding on relevant conduct reaffirmed the offense level of 35.

Additionally, the district court held that the objections made by Lister's attorney were frivolous, and denied any reduction in the sentence for acceptance of responsibility. This finding came after a series of questions in line with this Court's decision in *United States v. Purchess*, 107 F.3d 1261 (7th Cir. 1997), when the district judge attempted to determine if Lister understood and adopted the challenges made by his attorney, Mr. Kelly:

THE COURT: And are you in agreement with those challenges which have been made on your behalf?

LISTER: Basically I rely on my lawyer for that, Your Honor.

THE COURT: Then you don't agree with him, is that what you're saying?

LISTER: Yeah. I basically just rely on him for it.

THE COURT: Are you accepting the challenges as offered by your lawyer?

LISTER: I basically just rely on him to just—

THE COURT: Did he tell you that you should not accept his recommendations?

MR. KELLY: Well, Your Honor, I'm not going to let my client answer a question that invades attorney-client privilege.

Sentencing Hr'g Tr. 2-3, Dec. 16, 2004. Following this exchange and judicial finding, Lister's offense level was elevated to 38. When paired with his Criminal History Category of IV, the Sentencing Table yielded a suggested guideline range of 324 to 405 months. U.S.S.G. § 5A.

Prior to imposing the sentence, the district judge stated that "the Court will impose a sentence consistent with the provisions set forth in 18 United States Code Section 3553(a). . . ." Sentencing Hr'g Tr. 12-13, Dec. 16, 2004. He then reviewed Lister's past and the immediate criminal offense. Specifically, Judge Shabaz noted the early start and progressive nature of Lister's drug use, his attempts to rehabilitate himself, his previous felony conviction, and the fact that Lister was on probation supervision at the time that the instant crime was committed. Judge Shabaz concluded this review by stating that Lister "has remained undeterred from participating in new criminal conduct." Sentencing Hr'g Tr. 12-13, Dec. 16, 2004.

Following this review the district court sentenced Lister in a two-step process. First, treating the Federal Sentencing Guidelines manual as advisory per our decision in *United States v. Booker*, 375 F.3d 508 (7th Cir. 2004), Judge Shabaz initially considered sentencing Lister to 40 years, the maximum term contemplated under the plea agreement. Noting the reliability of the Federal Sentencing Guidelines, however, the district judge calculated a "suggested" term of 324 to 405 months. Based upon this

calculation, Judge Shabaz imposed a term of 405 months, reasoning that the sentence would "achieve the societal interest of punishing and deterring the defendant as well as protecting the community." Sentencing Hr'g Tr. 15, Dec. 16, 2004. Moreover, he noted that "[t]his is probably the most significant amount of cocaine base that has been brought to this Court's attention for perhaps as long as it can recall and the Court does believe that a most significant sentence is necessary." *Id.* at 15. He then took the second step of calculating an alternative sentence under the mandatory guidelines and again arrived at a term of 405 months.

The final judgment on Lister's case was entered on December 16, 2004, and he filed a timely notice of appeal on December 23, 2004.

Appellant now argues four points of error; points two and four merge. The resulting arguments are as follows: first, that the district court erred in denying credit for his acceptance of responsibility, second, that his sentence was unreasonable, and third, that the district judge's findings on relevant conduct violated his right to due process.

## II. Discussion

### A. Acceptance of Responsibility.

On appeal Lister primarily argues against the district court's finding that he failed to accept responsibility for his crimes, *see* U.S.S.G. § 3E1.1. This denial of credit, he argues, led to an erroneous application of the guidelines.

In seeking credit for accepting responsibility for his crimes, the defendant bears the burden of proving this acceptance by a preponderance of the evidence. *United States v. Travis*, 294 F.3d 837, 840 (7th Cir. 2002); *United*

*States v. Ewing*, 129 F.3d 430, 435 (7th Cir. 1997). We review the district court's decision on this fact-based finding for clear error. *United States v. Hicks*, 368 F.3d 801, 808 (7th Cir. 2004); *United States v. Mayberry*, 272 F.3d 945, 948 (7th Cir. 2001). Normally, a defendant's plea of guilty is evidence of his having accepted responsibility. *United States v. Bothun*, 424 F.3d 582, 586 (7th Cir. 2005) (citing application note to U.S.S.G. § 3E1.1). Furthermore, the application note to Sentencing Guideline 3E1.1 allows the defendant to "remain silent in respect to relevant conduct beyond the offense of conviction without affecting his ability to obtain a reduction under this subsection." U.S.S.G. § 3E1.1, cmt. n.1(a). But where a defendant "falsely denies, or frivolously contests, relevant conduct that the court determines to be true" he may be found to have acted in a "manner inconsistent with acceptance of responsibility." *Id.*; *United States v. Purchess*, 107 F.3d 1261, 1264 n.1 (7th Cir. 1997); *United States v. Booker*, 248 F.3d 683, 689-91 (7th Cir. 2001) (holding defendant who pleaded guilty but challenged PSIR's findings on drug quantity was properly denied acceptance of responsibility (additionally, we note that this Booker is not the same Booker that successfully appealed his case to the Supreme Court in 2004)). For defendant to properly contest findings presented in a PSIR they need to do more than simply deny the information presented. *Purchess*, 107 F.3d at 1267-68 (citing *United States v. Taylor*, 72 F.3d 533, 547 (7th Cir. 1995)). Instead, they must present evidence. *See id.*

Furthermore, defendants may not circumvent this barrier by using their attorney to make the challenges. *Id.* at 1268-69. Frivolous challenges and denials made by one's attorney also place a deduction for acceptance of responsibility at risk. *Id.* at 1267-68. But this leap of responsibility between the attorney and the defendant must be carefully evaluated. In *Purchess*, we stated that

where the defendant stays silent on relevant conduct, but his attorney challenges facts presented in the PSIR, it would be best for the court to determine whether the defendant understands and agrees with his attorney's argument before denying the reduction. *Id.* However, it is not the responsibility of the court to interrogate the defendant and elicit a response where he effectively avoids answering the question. The burden of proof regarding the acceptance of responsibility remains with the defendant.

At the sentencing hearing, Lister's attorney challenged the factual chronology contained within the PSIR. The Probation Office concluded that Lister was responsible for a total of 1.84 kilograms of cocaine base distributed during one of the four prior years. This amount and subsequent finding was based on Lister's own admissions in his PSIR interview that was subsequently corroborated by Gosha and Sims. Lister's attorney argued that the greater amount had been distributed before his client's 1998 conviction. This argument was not supported by new information, but was a reinterpretation of the statements contained within the PSIR. In an effort to follow our guidelines set forth in *Purchess*, the district court repeatedly questioned Lister to determine if he understood and agreed with his attorney's objections to the PSIR chronology. In each response, however, Lister eschewed a simple answer for what may only be described as an attempt at legal hair-splitting, ultimately frustrating the court's determination. Judge Shabaz subsequently found that the PSIR chronology was reliable by a preponderance of the evidence and that Lister had frivolously contested the facts contained therein, thus denying him any credit for acceptance of responsibility.

While our decision in *Purchess* noted that the district judge should make an effort to determine the defendant's understanding of his attorney's challenges, we also made

known our reluctance to add to the burdens of the district court at sentencing. *Purchess*, 103 F.3d at 1269. Furthermore, *Purchess* involved a defendant with a fifth-grade education and a limited command of the English language. *Id.* at 1268. In comparison, Lister attended four years of high school and studied business management at a technical college. His reluctance to answer in a straightforward manner at trial may be more readily attributed to conscious choice rather than incomprehension. Under these circumstances, we cannot say that the district court committed clear error when it found that Lister had not accepted responsibility for his crimes.

**B. Review of the sentence for unreasonableness.**

Lister also challenges the overall length of his term as erroneously calculated and unreasonable. In *United States v. Booker*, the Supreme Court held that the Federal Sentencing Guidelines were no longer mandatory and that all sentences must be reviewed for "unreasonableness." 125 S.Ct. 738, 765-67 (2005). District courts are aided in their determination of reasonableness via a mandatory examination of the factors set forth in 18 U.S.C. § 3553(a). *Id.* at 764-65, 67; *United States v. Rodriguez-Alvarez*, 425 F.3d 1041, 1045 (7th Cir. 2005). These factors include "the nature and circumstances of the offense and the history and characteristics of the defendant." 18 U.S.C. § 3553(a)(1). In determining the specific term, § 3553(a) advises that the sentence should "reflect the seriousness of the offense," "provide just punishment," and "protect the public from further crimes of the defendant." 18 U.S.C. § 3553(a)(2)(A)-(C). Additionally, this court has held that "any sentence that is properly calculated under the Guidelines is entitled to a rebuttable presumption of reasonableness." *United States v. Mykytiuk*, 415 F.3d 606, 608 (7th Cir. 2005).

At the outset of this reasonableness review, Lister briefly challenges the accuracy of the district court's calculation of his advisory sentence range. He argues that the incorporation of his relevant conduct into his total offense level was in error. But *Booker* and its predecessor cases did not limit such judicial factfinding in the sentencing context. *United States v. Bryant*, 420 F.3d 651, 656 (7th Cir. 2005). Instead, they held that a Sixth Amendment problem arises where the sentence exceeds the statutory maximum of the charged crime or where the term is imposed under a mandatory sentencing scheme. *Booker*, 125 S.Ct. at 750; *see United States v. Dean*, 414 F.3d 725, 729-30 (7th Cir. 2005). Neither of these concerns are present upon review of Lister's sentencing. The district court calculated the appropriate range of 324-405 months based upon his guilty plea, relevant conduct, and criminal history. The district court then reviewed the § 3553(a) factors to choose a discretionary sentence within that range.

But Lister argues that the district court's sentence failed to adequately consider the factors set forth in § 3553(a). As noted above, *Booker* does command such a review. *Booker*, 125 S.Ct. at 764-65, 67. This Court, however, has held that a point-by-point analysis of each factor listed in § 3553(a) is not necessary to meet the *Booker* requirement. *Dean*, 414 F.3d at 729. "Judges need not rehearse on the record all of the considerations that 18 U.S.C. § 3553(a) lists; it is enough to calculate the range accurately and explain why (if the sentence lies outside it) this defendant deserves more or less." *United States v. George*, 403 F.3d 470, 472-73 (7th Cir. 2005). Furthermore, § 3553(a) may be met where the district judge offers an "adequate statement" of his reasoning that a particular sentence is appropriate for the defendant. *Dean*, 414 F.3d at 729. The district court's sentencing procedure met these requirements.

In choosing a sentence within the 324-405 month range, the district judge explicitly considered § 3553(a). Judge Shabaz reviewed Lister's history with drugs and attempts at rehabilitation, his criminal history, and the overall quantity of cocaine base he had admitted distributing. Moreover, he announced that Lister's term would "achieve the societal interest of punishing and deterring the defendant as well as protecting the community." Sentencing Hr'g Tr. 15, Dec. 16, 2004. In light of these statements, we cannot agree that the § 3553(a) factors were not adequately considered. *See Rodriguez-Alvarez*, 425 F.3d at 1046-47 (holding that § 3553(a) factors were properly considered where district judge commented on defendant's criminal history and likelihood of recidivism before finding a "severe sentence" was warranted).

To complete our review of the district court's actions at sentencing we note that Judge Shabaz paired his guideline calculation with an effective review of § 3553(a) to arrive at Lister's "suggested" 405 month sentence. The district court did not consider the term mandatory and attempted to anticipate the future of the sentencing guidelines as well as possible. *See George*, 403 F.3d at 472. It was only in the alternative that Judge Shabaz offered a mandatory term of 405 months. *See Bryant*, 420 F.3d at 654-56; *Booker*, 375 F.3d at 515. Because this sentence was based on an adequate consideration of the § 3553(a) factors, we cannot say that it is unreasonable. We take this opportunity, however, to respectfully remind the district court that 1.84 kilograms of cocaine base is a moderate quantity compared to those higher amounts contemplated by 21 U.S.C. § 841. Yet, in comparison, the 405 month sentence nearly reaches the statutory maximum. Such a term leaves little room for the proportional sentencing that motivated Congress to pass the sentencing guidelines, a motivation recognized and

supported by the Supreme Court's second holding of *Booker*. *Booker*, 125 S.Ct. at 767-68 (citing U.S.S.G. § 1A1.1 application note.)

Because of the district court's discretionary ruling and mandatory alternative, there is no question that Judge Shabaz would impose the same sentence had he known the Supreme Court's full holding in *Booker*. Therefore, there is no need for a *Paladino* remand. *See United States v. Paladino*, 401 F.3d 471 (7th Cir. 2005).

While our established review for unreasonableness may have come to an end, Lister's challenges do not. He contends that *Booker* and its predecessors charge this court with the responsibility to avoid unwarranted sentencing disparities between co-defendants, and between controlled substances where Congress has specifically legislated differing, advisory, punishments. We note only briefly that the judiciary has no power to maintain charges against an individual where the United States Attorney exercises its executive discretion and chooses to dismiss them, as was the case here. This is not a matter of the "sentencing disparities" as considered by *Booker*, but instead an example of the separation of powers in our legal system. *United States v. Jones*, 438 F.2d 461, 467-68 (7th Cir. 1971) (citing *Goldberg v. Hoffman*, 225 F.2d 463, 464-65 (7th Cir. 1955)). Regarding the different punishment recommended for cocaine base and cocaine, this Court has previously upheld the ratio differential codified in 21 U.S.C. § 841. *See United States v. Lawrence*, 951 F.2d 751 (7th Cir. 1991). The Supreme Court's holdings in *Booker* do nothing to overturn this decision. *See Booker*, 125 S.Ct. at 756-69. *Booker* rendered the sentencing guidelines advisory; it did not strike them down in their entirety. *Id.*

**C. Due Process Consideration.**

Lastly, Lister argues that the district court's finding on relevant conduct violated his right to due process because it was predicated on the unreliable testimony of Gosha and Sims. We begin by noting that "a defendant has a due process right to be sentenced on the basis of accurate information." *United States v. Townsend*, 73 F.3d 747, 751 (7th Cir. 1996). This right is generally satisfied when the facts in question are found by a preponderance of the evidence using information that has a "sufficient indicia of reliability to support its probable accuracy." *Id.* at 751-52 (citing *United States v. Salinas*, 62 F.3d 855, 859 (7th Cir. 1995)); *United States v. Ewers*, 54 F.3d 419, 421 (7th Cir. 1995) (internal quotation marks omitted). We review a district court's findings of fact regarding the quantity of drugs considered as relevant conduct for clear error. *United States v. Beler*, 20 F.3d 1428, 1431 (7th Cir. 1994).

Contrary to Lister's contention, the district court based its finding of relevant conduct primarily on the admission of Lister himself. The district judge weighed the facts as presented in Lister's PSIR statement against his attorney's unsupported argument at the sentencing hearing and found the contested relevant conduct by a preponderance of the evidence. In this evidentiary evaluation, the district court reviewed and compared Lister's specific statements regarding dates, relevant transactions, monies paid, and the delegation of manufacturing duties. While Lister may have facially challenged the PSIR's chronology, he offered no evidence to counter the quantity calculations and he chose not to disavow his prior statements. Furthermore, these statements made during his PSIR interview were non-immunized and against his own interest. When presented with such a challenge, we cannot say that the district court committed clear error in its findings of fact. *See United States*

*v. Mustread*, 42 F.3d 1097, 1101-02 (7th Cir. 1994) (holding defendant may not simply deny the PSIR's truth, but must produce some evidence that calls the reliability or correctness of the alleged facts into question (citing *United States v. Isirov*, 986 F.2d 183, 185 (7th Cir. 1993) (internal quotation marks omitted))). Therefore, Lister's due process claim must fail.

AFFIRMED.

A true Copy:

Teste:

*Clerk of the United States Court of Appeals for the Seventh Circuit*

## CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution provides in relevant part:

No person shall ... be deprived of life, liberty, or property without due process of law ....

The Sixth Amendment to the United States Constitution provides in relevant part:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the ... district wherein the crime shall have been committed ...and ... to be confronted with the witnesses against him ....

18 U.S.C. § 3553(a) provides in relevant part:

The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other corrective treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—

(i) issued by the Sentencing Commission pursuant to 994(a)(1) of Title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such

guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

# OPPOSITION BRIEF

FILED
MAY 31 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 05-1257

# In the Supreme Court of the United States

TONY M. LISTER, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether a federal court of appeals, on review pursuant to *United States* v. *Booker*, 543 U.S. 220 (2005), should treat a sentence within the advisory Sentencing Guidelines range as presumptively reasonable.

2. Whether the district court violated petitioner's Fifth and Sixth Amendment rights by relying on uncharged "relevant conduct" in calculating petitioner's advisory Guidelines range.

3. Whether the district court clearly erred, when calculating petitioner's advisory Guidelines range, by denying petitioner a downward adjustment for acceptance of responsibility.

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# In the Supreme Court of the United States

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-15) is reported at 432 F.3d 754.

### JURISDICTION

The judgment of the court of appeals was entered on December 28, 2005. The petition for a writ of certiorari was filed on March 28, 2006. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

### STATEMENT

Following a guilty plea in the United States District Court for the Western District of Wisconsin, petitioner was convicted of distributing more than five grams of cocaine base, in violation of 21 U.S.C. 841(a)(1). He was sentenced to 405 months of imprisonment, to be followed

by five years of supervised release. Pet. App. 1-2, 7; 12/16/04 Sent. Tr. 16. The court of appeals affirmed. Pet. App. 1-15.

1. In December 2001, a drug-dealer-turned-informant called petitioner and asked to buy one and a half ounces of cocaine base for $1100. That same day, petitioner arranged for the sale and delivery of the drugs. Pet. App. 2; Gov't C.A. Br. 7.

2. In May 2004, a federal grand jury returned an indictment charging petitioner with distributing more than five grams of cocaine base, in violation of 21 U.S.C. 841(a)(1). A superseding indictment also charged petitioner with participating in a drug trafficking conspiracy. In October 2004, pursuant to an agreement with the government, petitioner pleaded guilty to the original distribution charge. Pet. App. 2; Gov't C.A. Br. 7.

3. Meanwhile, in a non-immunized interview with law enforcement agents in May 2004, petitioner admitted to distributing at least 1.8 kilograms of cocaine base during the prior four years. Presentence Investigation Report (PSR) paras. 25-26, 34. He stated that he started producing the drug five years earlier with the help of his "cook," Torrence Sims, who converted each ounce of powder cocaine obtained by petitioner into an ounce of cocaine base or "crack." PSR para. 26. Petitioner admitted that he sold an ounce and a quarter of crack every week for approximately one year, *ibid.*, which the PSR found amounted to more than 1.84 kilograms. PSR para. 34.

4. In preparing the PSR, the Probation Officer, relying principally on petitioner's admissions about his drug trafficking, concluded that petitioner should be held responsible for 1.84 kilograms of cocaine base. PSR paras. 34, 35; see PSR para. 41 (recommending a base

offense level of 38 under the Sentencing Guidelines). The PSR noted that this was "the most conservative estimate," because two of petitioner's confederates—Sims, his "cook" and partner, and Derrick Gosha, another regular customer—attributed far greater quantities of crack to petitioner in interviews with investigators. PSR para. 35; see PSR paras. 16, 32 (Sims admitted that he bought some 4.12 kilograms of crack and an equal amount of cocaine from petitioner between 2001 and 2003); PSR paras. 12, 33 (Gosha reported buying 5.62 kilograms of crack from petitioner between 1999 and 2001).

Based on the drug quantity of 1.84 kilograms of crack, and a three-point reduction in offense level for acceptance of responsibility, the PSR assigned petitioner a total offense level of 35. PSR paras. 47, 48; see Sentencing Guidelines § 3E1.1. Because petitioner had an extensive criminal history—13 previous convictions, including a 1998 conviction for possession with intent to distribute cocaine—and committed the instant offense while on probation for the cocaine conviction, the PSR placed him in criminal history category IV. See PSR paras. 53-69. Those determinations resulted in a Guidelines sentencing range of 235 to 293 months of imprisonment. PSR para. 107.

At sentencing, petitioner's lawyer objected to the drug quantity attributed to petitioner, arguing that petitioner's admissions to investigators involved his drug trafficking before his 1998 cocaine conviction. See Pet. App. 4. In an addendum to the PSR, the Probation Officer disagreed with counsel's interpretation of petitioner's statements. See PSR Add. 7 (noting that, at the May 2004 interview, petitioner said he started producing crack five years earlier, which would have been 1999);

*ibid.* (petitioner said he sold crack while he was employed at a clothing store, which was between 2000-2002); see also PSR paras. 12, 16, 32-34 (other witnesses corroborated that, between 1999 and 2003, petitioner trafficked in more than 1.84 kilograms of crack).

The district court asked petitioner whether he had read the PSR, his lawyer's objections, and the addendum to the PSR, and petitioner said that he had. See Sent. Tr. 2. The court and petitioner then engaged in the following exchange:

| | |
|---|---|
| The Court: | And are you in agreement with those challenges which have been made on your behalf? |
| [Petitioner]: | Basically I rely on my lawyer for that, Your Honor. |
| The Court: | Then you don't agree with him, is that what you're saying? |
| [Petitioner]: | Yeah. I basically just rely on him for it. |
| The Court: | Are you accepting the challenges as offered by your lawyer? |
| [Petitioner]: | I basically just rely on him to just— |
| The Court: | Did he tell you that you should not accept his recommendations? |
| [Counsel]: | Well, Your Honor, I'm not going to let my client answer a question that invades attorney-client privilege. |

The Court: Well, is he able to make an answer to this?

[Counsel]: He has not been charged with anything that would constitute relevant conduct in this case and he is going to exercise his Fifth Amendment privilege as to those matters.

*Id.* at 3.

The district court held that the defense objection to the PSR's drug-quantity determination was frivolous, and that petitioner therefore did not merit the three-level Guidelines reduction for acceptance of responsibility. 12/16/04 Sent. Tr. 13-14; see Guidelines § 3E1.1, comment. (n.1(a)) ("[A] defendant who falsely denies, or frivolously contests, relevant conduct that the court determines to be true has acted in a manner inconsistent with acceptance of responsibility."). Without the reduction, petitioner's total offense level under the Guidelines was 38, which resulted in a sentencing range of 324 to 405 months of imprisonment. Pet. App. 6.

The district court sentenced petitioner to 405 months of imprisonment. Pet. App. 1-2, 7. The court stated that, in light of *Blakely* v. *Washington*, 542 U.S. 296 (2004), and the Seventh Circuit's decision in *United States* v. *Booker*, 375 F.3d 508 (2004), aff'd, 543 U.S. 220 (2005), it was imposing the sentence "consistent with the provisions set forth in 18 [U.S.C.] 3553(a)," rather than under the Guidelines. See 12/16/04 Sent. Tr. 5; see also *id.* at 5, 15 (referring to the Guidelines as a "reliable indicator" of an appropriate sentence). The court found that, despite petitioner's prior involvement with the criminal justice system, he "has remained undeterred from participating in new criminal conduct," *id.* at 12-13,

and that a sentence of 405 months is necessary to "achieve the societal interest of punishing and deterring [petitioner] as well as protecting the community." *Id.* at 15. The court further noted that "[t]his is probably the most significant amount of cocaine base that has been brought to this Court's attention for perhaps as long as it can recall and the Court does believe that a most significant sentence is necessary." *Ibid.* The court indicated that, but for the contrary advice of the Guidelines, it would have been inclined to sentence petitioner to the maximum 40-year sentence. *Ibid.*

"[I]n the event the guidelines [were ultimately] determined to be constitutional," 12/16/04 Sent. Tr. 15, the district court also imposed the same term of 405 months of imprisonment as an alternative sentence, which the court determined by treating the Guidelines as mandatory. *Id.* at 15-16.

5. Petitioner appealed his sentence. While the appeal was pending, this Court decided *United States* v. *Booker*, 543 U.S. 220 (2005). *Booker* held that the Sixth Amendment right to a jury trial is violated when a defendant's sentence is increased based on judicial fact-finding under mandatory federal Sentencing Guidelines. As a remedy for that constitutional infirmity, the Court severed two provisions of the Sentencing Reform Act of 1984 (SRA), 18 U.S.C. 3551 *et seq.* *Booker*, 543 U.S. at 258-265. The first was 18 U.S.C. 3553(b)(1) (Supp. III 2003), which had required courts to impose a Guidelines sentence. "So modified, the [SRA] * * * makes the Guidelines effectively advisory. It requires a sentencing court to consider Guidelines ranges, * * * but it permits the court to tailor the sentence in light of other statutory concerns as well." 543 U.S. at 245-246 (citations omitted). The Court also severed the appellate-

review standards in 18 U.S.C. 3742(e) (2000 & Supp. III 2003), which had served to reinforce the mandatory character of the Guidelines. The Court replaced that provision with a general standard of review for "unreasonableness," under which courts of appeals determine "whether the sentence 'is unreasonable' with regard to [18 U.S.C.] 3553(a)." 543 U.S. at 261.[1]

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[1] Section 3553(a) provides:

> The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—
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> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
>
> (2) the need for the sentence imposed—
>
> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
>
> (B) to afford adequate deterrence to criminal conduct;
>
> (C) to protect the public from further crimes of the defendant; and
>
> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
>
> (3) the kinds of sentences available;
>
> (4) the kinds of sentence and the sentencing range established for—
>
> (A) the applicable category of offense committed by the applicable category of defendant as set forth in the

The court of appeals rejected all of petitioner's challenges to his sentence. Pet. App. 1-15. The court rejected petitioner's claim that the district court erred in relying on uncharged relevant conduct in calculating petitioner's offense level under the advisory Guidelines. See *id.* at 11 ("*Booker* and its predecessor cases did not limit such judicial factfinding in the sentencing context * * * [but] held that a Sixth Amendment problem arises where the sentence exceeds the statutory maximum of the charged crime or where the term is imposed under a mandatory sentencing scheme.") (citation omitted); *ibid.* (district court properly calculated petitioner's advisory Guidelines range "based upon his guilty plea, relevant conduct, and criminal history * * * [and] then reviewed the § 3553(a) factors to choose a discretionary sentence within that range"). The court of appeals further held that petitioner's due process right to be "sen-

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guidelines—

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code[;]

* * * * *

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code[;]

* * * * *

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

18 U.S.C. 3553(a) (2000 & Supp. III 2003).

tenced on the basis of accurate information" was satisfied by the district court's reliance on petitioner's own admissions in calculating his relevant conduct. *Id.* at 14 (citation omitted).

The court of appeals also held that the 405-month sentence imposed by the district court was not unreasonable. The court of appeals first observed that a sentence within a properly calculated Guidelines range is "entitled to a rebuttable presumption of reasonableness" on appellate review. Pet. App. 10 (quoting *United States* v. *Mykytiuk*, 415 F.3d 606, 608 (7th Cir. 2005)). After reviewing the sentencing transcript, the court of appeals concluded that the district court had adequately considered and justified its sentence based on the Section 3553(a) factors. Pet. App. 11-12. The court of appeals explained that the district court had taken into account petitioner's history with drugs, his failed attempts at rehabilitation, his criminal history, and the quantity of drugs he had admitted distributing, and that the court had reasonably determined that a 405 month sentence was necessary to "achieve the societal interest of punishing and deterring [petitioner] as well as protecting the community." *Id.* at 12 (quoting 12/16/04 Sent. Tr. 15).

Finally, the court of appeals rejected petitioner's claim that the district court erroneously refused to grant him an acceptance-of-responsibility reduction when calculating the sentencing range recommended by the Guidelines. The court of appeals noted that a defendant's guilty plea is typically evidence of his having accepted responsibility, Pet. App. 8, and that a defendant may remain silent about relevant conduct without losing the acceptance-of-responsibility adjustment, *ibid.* The court also noted, however, that a defendant who falsely denies or frivolously contests relevant conduct acts in a

"manner inconsistent with acceptance of responsibility." *Ibid.* (quoting Guidelines § 3E1.1, comment. (n.1(a))). Relying on circuit precedent, the court stated that a defendant may not circumvent that rule by remaining silent and allowing his attorney to make frivolous challenges on his behalf. Pet. App. 8 (citing *United States* v. *Purchess*, 107 F.3d 1261, 1268-1269 (7th Cir. 1997)). Here, the court found, the district court repeatedly questioned petitioner in an attempt to ascertain whether he understood and agreed with his lawyer's factual challenges to the PSR, but "[i]n each response, * * * [petitioner] eschewed a simple answer for what may only be described as an attempt at legal hair-splitting, ultimately frustrating the court's determination." Pet. App. 9; see *id.* at 10 (noting that, given petitioner's level of education, "[h]is reluctance to answer in a straightforward manner * * * may be more readily attributed to conscious choice rather than incomprehension"). The court of appeals therefore concluded that the district court did not commit clear error in finding that petitioner had failed to accept responsibility for his crimes. *Id.* at 10.

## ARGUMENT

1. Petitioner contends (Pet. 3-11) that, on review pursuant to *United States* v. *Booker*, 543 U.S. 220 (2005), a federal court of appeals should not treat a sentence within the advisory Sentencing Guidelines range as presumptively reasonable. The court of appeals correctly concluded otherwise, and this Court's review of that conclusion is not warranted.

a. Since *Booker*, several courts of appeals have held that a sentence within a properly calculated Guidelines range is "presumptively reasonable" on appellate re-

view. *E.g.*, *United States* v. *Terrell*, 445 F.3d 1261, 1264-1265 (10th Cir. 2006); *United States* v. *Johnson*, 445 F.3d 339, 341-344 (4th Cir. 2006); *United States* v. *Williams*, 436 F.3d 706, 708 (6th Cir. 2006); *United States* v. *Alonzo*, 435 F.3d 551, 554 (5th Cir. 2006); *United States* v. *Tobacco*, 428 F.3d 1148, 1151 (8th Cir. 2005); *United States* v. *Mykytiuk*, 415 F.3d 606, 608 (7th Cir. 2005). Those courts have relied on a variety of reasons, including that the Guidelines (1) incorporate the sentencing objectives found in 18 U.S.C. 3553(a), see, *e.g.*, *Terell*, 445 F.3d at 1265 (noting that "the Guidelines are generally an accurate application of the factors listed in § 3553(a)"); (2) are the product of extensive study and revision, reflecting the considered judgment of experts, Congress, and sentencing judges across the country, see, *e.g.*, *Mykytiuk*, 415 F.3d at 607 ("The Sentencing Guidelines represent at this point eighteen years' worth of careful consideration of the proper sentence for federal offenses."); and (3) yield sentences that are based on comprehensive, individualized fact-finding, see, *e.g.*, *Johnson*, 445 F.3d at 343-344 (observing that fact-finding under the Guidelines is "individualized," "extensive," and "designed to give the sentencing court a comprehensive overview of the defendant").

b. Petitioner contends (Pet. 5-9) that the effect of applying a presumption of reasonableness to a Guidelines sentence is to make the Guidelines effectively mandatory and thus unconstitutional. That is incorrect.

If a sentence within the Guidelines range is treated as presumptively reasonable, "it does not follow that a sentence *outside* the guidelines range [will be] *un*reasonable," *United States* v. *Myers*, 439 F.3d 415, 417 (8th Cir. 2006) (emphasis added), or even that such a sentence will be *presumptively* unreasonable. On the con-

trary, "there is no presumption of *unreasonableness* that attaches to a sentence that varies from the range." *United States* v. *Jordan*, 435 F.3d 693, 698 (7th Cir.), cert. denied, No. 05-10331 (May 15, 2006); accord *United States* v. *Reinhart*, 442 F.3d 857, 864 (5th Cir. 2006); *United States* v. *Foreman*, 436 F.3d 638, 644 (6th Cir. 2006). And it is *that* presumption, not the presumption that a Guidelines sentence is reasonable, that "would transform an 'effectively advisory' system * * * into an effectively mandatory one." *United States* v. *Moreland*, 437 F.3d 424, 433 (4th Cir.) (quoting *Booker*, 543 U.S. at 245), cert. denied, No. 05-10393 (May 15, 2006); see *United States* v. *Cunningham*, 429 F.3d 673, 679 (7th Cir. 2005) ("reasonableness is a range, not a point").

A district court's obligation is to sentence based on consideration of the factors in 18 U.S.C. 3553(a) (2000 & Supp. III 2003). See, *e.g.*, *United States* v. *Dean*, 414 F.3d 725, 729 (7th Cir. 2005). A district court may not impose *any* sentence, whether within or outside the Guidelines range, unless the sentence is supported by those factors. See, *e.g.*, *United States* v. *Duhon*, 440 F.3d 711, 716 (5th Cir. 2006), petition for cert. pending, No. 05-11144 (filed May 18, 2006); *United States* v. *Denton*, 434 F.3d 1104, 1113 (8th Cir. 2006). For that reason, even a sentence within the Guidelines range will not automatically be affirmed as reasonable. See, *e.g.*, *United States* v. *Lazenby*, 439 F.3d 928, 933-934 (8th Cir. 2006) (finding Guidelines sentence unreasonable).

c. Although the Fourth, Fifth, Sixth, Seventh, Eighth, and Tenth Circuits have held that a Guidelines sentence is presumptively reasonable on appellate review, see pp. 10-11, *supra*, the First, Second, Third, and Eleventh Circuits have not. Petitioner contends (Pet. 9-11) that this Court should grant review to resolve that

disagreement, but there is no present need for the Court to decide whether a Guidelines sentence should be treated as presumptively reasonable.

First, it is far from clear that the standards employed by the First, Second, Third, and Eleventh Circuits are materially different from a presumption of reasonableness, such that there will be different results in cases with similarly situated defendants. The Eleventh Circuit has said that a Guidelines sentence is "ordinarily" reasonable, *United States* v. *Talley*, 431 F.3d 784, 788 (2005); the Third Circuit has said that a sentence within the Guidelines range is "more likely" to be reasonable than a sentence outside the range, *United States* v. *Cooper*, 437 F.3d 324, 332 (2006); the Second Circuit has said that a Guidelines sentence will be reasonable "in the overwhelming majority of cases," *United States* v. *Fernandez*, 443 F.3d 19, 27 (2006); and the First Circuit has said that the Guidelines "continue * * * to be an important consideration * * * on appeal," *United States* v. *Jiménez-Beltre*, 440 F.3d 514, 518 (2006) (en banc). In each of those cases, moreover, the court of appeals found that the Guidelines sentence at issue was reasonable. See *Fernandez*, 443 F.3d at 34; *Jiménez-Beltre*, 440 F.3d at 519-520; *Cooper*, 437 F.3d at 332; *Talley*, 431 F.3d at 788. Whatever the differences in terminology, therefore, there is universal agreement that a sentence within a properly calculated Guidelines range will usually be reasonable.

Second, *Booker* has been the law for only 16 months, and the courts of appeals are just beginning to evaluate post-*Booker* sentences. Accordingly, even if there were material differences in the standards applied by the courts of appeals in reviewing sentences for unreasonableness, it would be premature for this Court to ad-

dress the issue. The lower courts are still in the early stages of developing and refining the standards governing the imposition and review of post-*Booker* sentences, and, as those courts themselves recognize, those standards are continuing to evolve. See, *e.g.*, *Jiménez-Beltre*, 440 F.3d at 521 (Torruella, J., concurring) ("As the case law develops, the standards we announce today will evolve."); *United States* v. *Castro-Juarez*, 425 F.3d 430, 431 (7th Cir. 2005) (evaluation of the "reasonableness" of a sentence is "a process that continues to evolve in our decisions applying *Booker*"); *United States* v. *Webb*, 403 F.3d 373, 383 (6th Cir. 2005), cert. denied, 126 S. Ct. 1110 (2006) (the meaning of reasonableness and the procedures to be employed by the courts will "evolve on a case-by-case basis").

d. On February 21, 2006, this Court granted a writ of certiorari in *Cunningham* v. *California*, No. 05-6551, to decide whether California's Determinate Sentencing Law, by permitting sentencing judges to impose enhanced sentences based on their determination of facts not found by the jury or admitted by the defendant, violates the Sixth and Fourteenth Amendments. Because the federal Guidelines system is unlike the California sentencing scheme at issue in *Cunningham*, the petition in this case need not be held pending the disposition of that case.

Under California law, the statute defining a criminal offense typically specifies three possible terms of imprisonment: a lower term, a middle term, and an upper term. See *People* v. *Black*, 113 P.3d 534, 538 (Cal. 2005), petition for cert. pending, No. 05-6793 (filed Sept. 28, 2005). California's Determinate Sentencing Law provides that "the court shall order imposition of the middle term, unless there are circumstances in aggravation or

mitigation of the crime," Cal. Penal Code § 1170(b) (West 2004), and a rule issued under the Law provides that a court may impose the upper term "only if, after a consideration of all the relevant facts, the circumstances in aggravation outweigh the circumstances in mitigation," Cal. R. Ct. 4.420(b) (2006). Aggravating and mitigating circumstances may be established by a preponderance of the evidence, *ibid.*, and, in determining the "relevant facts," the court may consider "the record in the case, the probation officer's report, other reports including * * * statements in aggravation or mitigation submitted by the prosecution, the defendant, or the victim, * * * and any further evidence introduced at the sentencing hearing," Cal. Penal Code § 1170(b) (West 2004).

Unlike the California law, which is "worded in mandatory language," *Black*, 113 P.3d at 544, the SRA, as modified by *Booker*, is not a determinate sentencing law. The federal Guidelines are "effectively advisory," *Booker*, 543 U.S. at 245, and federal sentences are ultimately based on the factors in 18 U.S.C. 3553(a) (2000 & Supp. III 2003).

2. Petitioner also renews his contention (Pet. 11-17) that the district court violated his constitutional rights by calculating his advisory Guidelines range based on "relevant conduct" that was proved to the court by a preponderance of the evidence. The court of appeals correctly rejected that claim, and it does not warrant further review.

This Court has repeatedly held that a court may, consistent with the Constitution, select a sentence from within a statutory range based on uncharged conduct that has been proved to the court by a preponderance of the evidence. See *Edwards* v. *United States*, 523 U.S.

511, 514-515 (1998) (even if jury convicted defendant of cocaine-only conspiracy, judge may impose higher Guidelines sentence based on finding that defendant's conduct included crack-related activities); *United States* v. *Watts*, 519 U.S. 148, 154-157 (1997) (per curiam) (court may consider conduct constituting an offense of which defendant was acquitted, and application of preponderance standard at sentencing generally satisfies due process) (citing *McMillan* v. *Pennsylvania*, 477 U.S. 79, 91-92 (1986)); *Witte* v. *United States*, 515 U.S. 389 (1995) (consideration of "relevant conduct" under the Sentencing Guidelines is not "punishment" for an uncharged offense); *Nichols* v. *United States*, 511 U.S. 738, 747 (1994) ("a sentencing judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come") (internal quotation marks and citation omitted); *Williams* v. *New York*, 337 U.S. 241, 246 (1949) (courts have traditionally "practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law").[2]

*Booker* did not disturb that settled precedent. In accordance with *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), and *Blakely* v. *Washington*, 542 U.S. 296 (2004), *Booker* held that any fact, other than a prior conviction, necessary to support a sentence exceeding "the maximum authorized" by a guilty plea or jury verdict must

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[2] See also 18 U.S.C. 3661 ("No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.").

be admitted by the defendant or proved to a jury beyond a reasonable doubt. 543 U.S. at 244. By modifying the SRA to make the Sentencing Guidelines advisory, rather than mandatory, however, *Booker* remedied the constitutional problem presented by the Guidelines: now, the "maximum [sentence] authorized" by the jury verdict in federal criminal cases is the statutory maximum for the offense under the United States Code. Thus, as long as the sentencing judge imposes a sentence within the statutory range, sentencing based on judge-found facts by a preponderance of the evidence does not violate the Sixth Amendment. See *Booker*, 543 U.S. at 233 (noting that, "when a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant"); *id.* at 239-241 (reviewing *Edwards*, *Watts*, and *Witte* and concluding that "[n]one of our prior cases is inconsistent with today's decision").

Since *Booker*, the courts of appeals have consistently held that sentencing judges retain the authority to consider uncharged, relevant conduct proven by a preponderance of the evidence. See *United States* v. *Lauder*, 409 F.3d 1254, 1269 (10th Cir. 2005) ("after *Booker*, it is now universally accepted that judge-found facts by themselves do not violate the Sixth Amendment"); *e.g.*, *United States* v. *Giaquinto*, 441 F.3d 195, 197 (3d Cir. 2006); *Alonzo*, 435 F.3d at 553; *United States* v. *Vaughn*, 430 F.3d 518, 527 (2d Cir. 2005), cert. denied, 126 S. Ct. 1665 (2006); *United States* v. *Price*, 418 F.3d 771, 787-788 (7th Cir. 2005); *United States* v. *Magallanez*, 408 F.3d 672, 684-685 (10th Cir.), cert. denied, 126 S. Ct. 468 (2005); *United States* v. *Duncan*, 400 F.3d 1297, 1304-1305 (11th Cir.), cert. denied, 126 S. Ct. 432 (2005).

Petitioner was sentenced within the 40-year statutory maximum applicable to his crime by a court that did not consider itself bound by the Guidelines and that based petitioner's sentence on the Section 3553(a) factors. The uncharged conduct that the court considered in imposing the sentence was established principally by petitioner's own admissions—which, as the court of appeals found, petitioner "chose not to disavow" or otherwise contradict. Pet. App. 14. The court of appeals correctly concluded that petitioner's sentence accorded with the Constitution, and there is no reason for this Court to revisit that conclusion.

3. Petitioner also argues (Pet. 17-21) that the district court erred, when calculating petitioner's advisory Guidelines range, in denying him credit for acceptance of responsibility. That fact-bound claim does not warrant this Court's review.

The Guidelines provide for a sentencing credit if "the defendant clearly demonstrates acceptance of responsibility for his offense." Sentencing Guidelines § 3E1.1(a). As the court of appeals explained, a guilty plea is typically persuasive evidence of a defendant's acceptance of responsibility, but it does not entitle the defendant to the credit. See Pet. App. 8; Sentencing Guidelines § 3E1.1 comment. (n.3). A defendant who "falsely denies, or frivolously contests, relevant conduct that the court determines to be true" may be found to have acted in a "manner inconsistent with acceptance of responsibility." Pet. App. 8 (quoting Sentencing Guidelines § 3E1.1, comment. (n.1(a))).

A defendant may remain silent about his relevant conduct without forfeiting the acceptance-of-responsibility credit. See Guidelines § 3E1.1, comment. (n.1(a)). But, as the Seventh Circuit has sensibly held, a defen-

dant may not circumvent the Guidelines' limits on the credit by invoking his right to silence while having his lawyer make frivolous challenges on his behalf to the relevant-conduct findings. See *United States* v. *Purchess*, 107 F.3d 1261, 1268-1269 (1997). In accordance with *Purchess*, the district court tried to determine whether petitioner endorsed his lawyer's challenges to the PSR before the court decided whether to grant petitioner the acceptance-of-responsibility credit. See p. 10, *supra*. The court of appeals concluded that petitioner made a "conscious choice" to frustrate that determination by "eschew[ing] a simple answer" to the court's questions and engaging in "legal hair-splitting." Pet. App. 9-10. Based on that conclusion, the court of appeals correctly held that the district court did not clearly err in finding that petitioner had not accepted responsibility. See *Purchess*, 107 F.3d at 1269 (reviewing under clear error standard a finding that the defendant had not accepted responsibility and observing that such a finding is "uniquely suited to the intuition and experience of the district judge"). No further review is warranted.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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